IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1061

WINDWARD SHIPPING (LONDON) LIMITED, *et al.*,

Petitioners,

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF FOR RESPONDENTS IN OPPOSITION

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Opinions Below

The order of the Supreme Court of Texas dated October 4, 1972, denying petitioners' application for a writ of error, and which determined, "that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals", is set forth in petitioners' Appendix D.

The opinion of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, dated May 17, 1972 is reported at 482 S.W. 2d 675, and is set forth in petitioners' Appendix B.

The unreported opinion and order of the District Court of Harris County, 164th Judicial District of Texas, dated December 10, 1971, is set forth in petitioners' Appendix A.

Jurisdiction

The alleged jurisdictional requisites are set forth in the petition at page 2.

Question Presented

Whether the Labor Management Relations Act as amended, 61 Stat. 136, 29 U.S.C. § 141 *et seq.*, preempts state jurisdiction to enjoin peaceful and truthful picketing of foreign flag vessels in United States ports, protesting that the wages and benefits paid and provided seamen aboard such vessels are substandard to those of American seamen resulting in extreme damage to American seamen wage standards and benefits, loss of jobs and employment opportunities here in the United States and further requesting persons not to patronize such vessels, as a consequence of which, American employees of American employers refused to patronize or work upon the picketed vessels.

Statutes Involved

The relevant statutory provisions are: Labor Management Relations Act, §§ 7 and 8(b)(4); 29 USC §§ 157 and 158(b)(4). The text of these provisions is set forth in petitioners' Appendix F (pages F3, F6-F8).

Statement of the Case

The background facts

The six respondent labor organizations are the major deep sea American maritime unions representing American seamen. On October 27, 1971, their representatives met to discuss what lawful action could be taken to arrest the declining employment opportunities and preserve those which remained, for their members here in the United States, which employment opportunities were then at its lowest point in twenty years with their members having lost over 50% of their former job opportunities in the last few years (O.R. 2B, page 142).[1]

The representatives present at such meeting realized that foreign flag vessels paying wages and providing benefits to their seamen substantially less than those enjoyed by American seamen on United States flag vessels, were able to underbid American flag ships for the transportation of American sea borne commerce. Conversely, the declining American flag fleet, paying wages and providing benefits to American seamen in accordance with the standards in the United States, had higher operating costs and were not able to profitably compete against these foreign flag vessels for American sea borne commerce (O.R. 2B, pages 119-125). Such representatives further recognized that the consequences of the foregoing had been a long and constant period of decline in the number of job opportunities available for American seamen here in the United States aboard American flag vessels from slightly better than 93,000 to approximately 30,000 at present (O.R. 2B, pages 116-119). Commensurate with the foregoing, had been a decline in the amount of American sea borne commerce carried in American flag vessels from 43% of such commerce in 1951,

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[1] Citations are to the original record set forth in the petition, p. 4, fn. 2. And references demonstrated by letters and numbers will be identical to those utilized by petitioners in such fn. 2.

to less than 5% of such commerce, notwithstanding during the same period American sea borne commerce had increased almost 300% (O.R. 2B, pages 119-20).

Accordingly, the respondent unions, who over the years already had reduced their manning scales and other standards in an attempt to help their American flag employers meet the foreign flag competition for American sea borne commerce (O.R. 2B, pages 184-185, 187-188, 224, 227), decided to act together as a committee (the "Committee") to bring this problem to the attention of the American public and ask for their help (O.R. 2B, pages 143, 183-185, 200-201, 225-226).

After arriving at the obvious conclusion that the lower wages and benefits being paid and provided to foreign seamen on foreign flag vessels, which were drastically substandard to those being paid American seamen aboard American flag vessels,[2] conferred an enormous advantage to foreign flag vessels carrying American sea borne commerce, with most serious adverse effects upon the job opportunities for American seamen on American flag vessels, the Committee decided to take lawful steps to protect the jobs and standards of their members. The question of what specific lawful steps were to be taken was referred to counsel (O.R. 2B, pages 142-148, Resp. Exhibit 8).

Counsel advised the Committee it could engage in peaceful publicity picketing to bring this problem to the attention of the American public and ask them not to patronize the picketed vessels. In addition, counsel prepared the appropriate language for the picket signs,

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[2] An Able Bodied seaman aboard the S.S. Northwind under the contract of employment, articles of agreement and foreign bargaining agreement, base pay is $68.10 per month (O.R. 2A, pages 88-90, stipulation exhibits), contrasted to an Able Bodied American seaman aboard an American flag vessel base pay of $528.46 per month (O.R. 2B, page 108, stipulation exhibit NMU collective bargaining agreement).

literature to be used for distribution and written instructions (O.R. 2B, page 148, Resp. Exhibit 8). The Committee accepted counsel's advice and collectively decided to do precisely what counsel recommended. Each participating union would advise their own membership of the planned activity and no participating union had the authority to speak for the Committee as a whole or vary its written instructions without the written consent of the Committee (*ibid.*).

Representatives of the Committee then went to various ports in the United States to personally carry out the Committee's instructions and took with them the picket sign language, written instructions and literature to the places where it was decided the initial picketing would take place (O.R. 2B, pages 148-150, 179-180, 197-198). Further, leaflets were prepared for distribution to the general public at home offices of certain shippers and shipping companies and publicity of the issues via all media, was undertaken (O.R. 2B, pages 162, 170-173).

The various representatives of respondents' union members of the Committee, in turn followed precisely their instructions and dispatched volunteer pickets to selected sites with the authorized picket signs and leaflets. Pickets were instructed to merely walk the picket line, speak to no one and hand out the authorized leaflets (O.R. 2B, pages 181, 197-198, 198-200). The pickets in turn followed these instructions to the letter. They walked their assigned area with the authorized signs, spoke to no one and conducted themselves orderly and peacefully and distributed the authorized literature (O.R. 2B, pages 208-211, 212-215, 217-218).

The picketing of the S.S. *Theomana* and *Northwind* at Houston[3]

On October 28 and 29, 1971, respectively, respondents began picketing petitioners' two foreign flag vessels, the

[3] The relevant facts following, as to what transpired at Houston, were stipulated by the parties (O.R. 2, pages 15, 24, Resp. Exhibit 1; O.R. 2B, pages 218, 219).

THEOMANA and NORTHWIND with signs bearing the following legend:

"ATTENTION TO THE PUBLIC

The wages and benefits paid seamen aboard the vessel THEOMANA (NORTHWIND) are substandard to those of American seamen. This results in extreme damage to our wage standards and loss of our jobs. Please do not patronize this vessel. Help the American seamen. We have no dispute with any other vessel on this site.

Americon Radio Association, AFL-CIO

International Organization of Master Mates and Pilots AFL-CIO

National Marine Engineers Beneficial Association AFL-CIO

National Maritime Union of America, AFL-CIO

Radio Officers Union of the United Telegraph Workers AFL-CIO

Seafarers International Union of North America AFL-CIO (O.R. 2, page 15, Resp. Exhibit 1, paragraph 4)"

The picket line at all times was "peaceful and without violence or threat of violence" and was maintained by four men who patrolled along the dock in a contiguous area adjacent to the vessel picketed (*ibid.*, Respondents' Exhibit 1, paragraphs 4 and 5). Each of the pickets carried the above sign, spoke to no one and handed out the same literature as is annexed to respondents' Exhibit 1, *supra* (*ibid.* paragraph 4, Respondents' Exhibit 1, O.R. 2B, pages 218-219).[4]

[4] Similar Committee picketing activity as at bar, and also at Houston, was also the subject of litigation in the United States District Court in Houston wherein an injunction request was denied, the denial affirmed by the Fifth Circuit and petition for certiorari

Respondents expressed no interest, nor made oral or written demand upon petitioners' companies seeking to represent any of their employees (O.R. 2, page 24). And it was further stipulated that petitioners had no labor dispute with their employees and that respondents' picketing was not in support of any problem concerning petitioners' employees and petitioners as their employers (O.R. 2, page 15, Resp. Exhibit 1, paragraph 9). It was further stipulated that the petitioner Windward Shipping had invoked the jurisdiction of the NLRB on October 29, 1971, when it was charged that respondents, by picketing the foreign flag vessel, THEOMANA as aforesaid, were engaged in an unlawful secondary boycott within the meaning of 8(b)(4)(B) of the Labor Management Relations Act, (Act), 29 USC 158(b)(4)(B) (*ibid.* par. 8).

In addition to filing such charge with the NLRB, and as found by the court below, the next day petitioner Windward instituted an action in the District Court of Harris County, Texas, seeking a temporary and permanent injunction restraining respondents from picketing the sub-

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denied by this Court. *Port of Houston Authority of Harris County, Texas* v. *International Organization of Masters, Mates, etc.*, 456 F. 2d 50 (1972), cert. den. — U. S. —, 81 LRRM 2391. The Circuit's recitation of respondents' conduct in the case before it, demonstrates identical conduct engaged in at bar, to wit:

> "The unions were jointly engaged in peacefully picketing selected foreign vessels in the Houston Port. At the time of the hearing, picket lines consisting of four pickets were being maintained at three of the forty-nine docks in the port.
>
> The pickets carried placards and also handed out literature. The effort was to call the attention of the public to the declining job opportunities for the American seaman caused by the use of foreign vessels, and to the substandard wages and working conditions on such vessels. The public was asked not to patronize the foreign vessels. The result was that other workers refused to cross the picket lines and the foreign vessels could not be unloaded." (*ibid.* 52)

ject vessel, alleging that respondents were guilty of secondary picketing (Petitioners' Appendix B, page B3).

Thereafter the complaint with the NLRB was voluntarily withdrawn by said petitioner and the pleadings in the District Court amended to allege that the purpose of respondents' picketing was to induce the vessels' owners to breach their contracts with their crews and foreign unions representing such crews in violation of Texas local law (petitioners' Appendix B, pages B3 and 4).

As testified to by petitioners' witnesses, when longshoremen employed by the American stevedoring company saw the picket lines adjacent to the picketed vessels and read the literature distributed, they refused to patronize and work upon the picketed vessels (O.R. 2, pages 26-27, 30-31, 35, 49).

It was alleged at trial that as a consequence of the picketing with only partial cargo aboard, the picketed vessels were unseaworthy. As a consequence respondents voluntarily agreed to remove the picket lines to enable the vessels to be patronized, receive cargo and rendered seaworthy (O.R. 2, pages 57-58).

The district court in Harris County, Texas, "after consideration and study of the evidence, stipulations of the parties and the briefs filed", found that respondents' conduct complained of was arguably within the jurisdiction of the NLRB and that for such reason, preempted by the Board (petitioners' Appendix A, page A2). The Texas Court of Civil Appeals affirmed the district court's findings (petitioners' Appendix B) and in accord, found that respondents' activities were peaceful picketing to protest substandard wages and benefits of the foreign seamen contrasted to American seamen, with the consequential adverse affect of such foreign wages and benefits upon American seamen and their job opportunities here in the United States, with a concurrent request to the public not

to patronize the foreign ships (petitioners' Appendix B, pages B7, 8, 12, 13). The appellate court concluded, such respondents conduct which "* * * but voices a complaint as to foreign wages and urges the public not to patronize foreign vessels * * * * * is peaceful picketing publicizing a labor dispute * * *", and upon decisional law, its validity is suggested. However, the court went on to hold, "(I)t is at least arguably a protected activity under section 7 of the LMRA", finally concluding, preempted by the NLRB and therefore the trial court properly dismissed petitioners' action (petitioners' Appendix B, p. B13). The Supreme Court of Texas found "no error requiring reversal of the judgment of the Court of Civil Appeals" (petitioners' Appendix D).[5]

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[5] Uninterruptedly, petitioners from court to court have proferred, premised upon partial testimony, that a finding be made that the Committee's picketing purpose was to compel the foreign flag petitioners to increase their foreign seaman wages and assumedly, to then argue, it is over the employer-employee relationship aboard the foreign vessels which the NLRB lacks jurisdiction to determine, ergo, no preemption. (See O.R. 1, Transcript petitioners post trial brief before the Trial Court, pages 6-8, 11, 16, 17; O.R. 3, petitioners' brief before Court of Civil Appeals, pages 11, 12, 20; O.R. 10, petitioners' supplemental brief for rehearing Court of Civil Appeals, page 8; O.R. 12, petitioners' application to Supreme Court of Texas for writ of error, pages 6, 7, 17.) Rebuffed in each of these four attempts, petitioners nevertheless, now request this ultimate Court to make such findings, indeed a most unusual procedure. Petitioners' manifest error is demonstrated by examination of all the testimony including the cited witnesses' testimony that his expressions are his own personal feeling and opinion, not the respondents and certainly not the picketing purpose of respondents picketing (O.R. 2B, pages 192-195). Similar thereto is the illustration of reply to a hypothetical question as to "accomplishing educational goals", by payment of equal wages and benefits both foreign and American, and whether such would result in cessation of the picketing activities. Obviously, if that occurred, the picketing would have to cease, it would then be untruthful and unlawful (O.R. 2B, page 158).

ARGUMENT

I.

The National Labor Relations Act preempts state jurisdiction to enjoin peaceful picketing of a foreign flag vessel in the United States by American seamen protestng the substandard wages and benefits paid and provided as contrasted to American seamen, and the adverse affect such substandard conditions have on American seamen and their employment opportunities here in the United States, concurrently requesting the public not to patronize such vessel.

A. Peaceful lawful protest picketing is a protected activity

Peaceful protest picketing to protest wage rates and benefits below those paid and received by workmen in the area, is a long established and fundamental right of American workers protected and preempted by Section 7 of the Labor Management Relations Act (Act). *Garner* v. *Teamsters, Chauffers & Helpers, Etc.*, 346 U.S. 485, 495-500; *United Steelworkers of America* v. *NLRB*, 376 U.S. 492, 498-499; *International Longshoremen's Local 1416* v. *Ariadne Shipping Company*, 397 U.S. 195, 201-202.

But whether the activity be arguably protected or prohibited, state injunctive jurisdiction is clearly preempted. *Garner, supra, Ariadne, supra; San Diego Building Trades Council* v. *Garmon*, 359 U.S. 326; *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138. And preemption applies whether or not there is a proximate employer—employee relationship, *Hotel Employees Union* v. *Sax Enterprises*, 358 U.S. 270; *Retail Clerks Local 560* v. *F. J. Newberry Co.*, 352 U.S. 987; *Pocatello Building & Construction Trades Council* v. *C. H. Elle Cont. Co.*, 352 U.S. 884.

Respondents members unquestioned were and are sustaining the grossest injury to their livelihood and job

opportunities here in the United States. Unquestionably a major cause thereof, was and is the substandard wages and benefits paid and provided foreign seamen aboard foreign flag vessels contrasted to American seamen, with such foreign vessels devouring up to 95% of American sea borne commerce. And it was these substandard wages and conditions which, with increasing continuity, had been permeating the American seamen job market here in the United States, with dire consequences on the employment opportunities and standards of American seamen taking place in their homeland. It was this frightening state of affairs that they were protesting and publicizing and concurrently, asking their fellow citizens help by not patronizing such foreign vessels.

As this Court stated in *Benz* v. *Campania Naviera Hidalgo S.A.*, 353 U.S. 138, 144, and in *McCulloch* v. *Sociedad Nacional Etc.*, 372 U.S. 10, 20, a prime purpose of the Act was to create "a bill of rights * * * for American workingmen" and that "the American workingman ha(d) been deprived of his dignity as an individual", and that "it is the purpose of the (Act) to correct such inadequacies".

The Act's Section 7 is clearly one of the vehicles created for the American worker to correct past inadequacies and to assure his dignity as an individual. And exercising a therein provided right, as American seamen by their protest at bar have undertaken, here in their homeland, constitutes their implementation of the protected right, and at the very least, an arguably protected right, *Garner* and *Garmon*, *supra*,[6] and as to which activity, state court jurisdiction to enjoin, is preempted by the Act.

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[6] It must be noted that at bar, one of the petitioners invoked the Act's NLRB's jurisdiction by the filing of unfair labor practice charges with the NLRB against the respondents. Such charge, by its processing would have ultimately determined the character of the respondents' conduct, protected or prohibited, but most significant, also determine any issue as to the Board's jurisdiction over the con-

We submit, that the unanimous opinions, judgments and orders of the three Texas courts below, based upon the facts as found after trial upon the merits, that Texas courts are without jurisdiction, by virtue of respondents exercise of protected or arguably protected rights under the Act with the determination of the latter, preempted by the NLRB. Such conclusion is fully in accord with prevailing law as enunciated by this Court.

B. NLRB jurisdiction is applicable to the case at hand, notwithstanding the vessels are foreign flags

As found by the courts below, "the basic facts • • • were established by stipulation or uncontraverted evidence", (petitioner's Appendix B pages B2-3). As previously shown, foreign flag vessels now carry 95% of American seaborne commerce. This condition has been brought about substantially by the foreign vessels substandard wages and conditions contrasted to those of American seamen. And, as conclusively demonstrated, such has had dire affect upon American seamen and their employment opportunities here in the United States. To preserve their remaining job opportunities here in the United States, respondents members engaged in protest picketing, publicizing the foregoing facts and requesting the American public not to patronize such foreign vessels.[7] As additionally found, there is no dispute between the petitioners and their employees alien crewmen. The respondents neither have nor claim the right to represent the foreign crews, nor seek

troversy, *infra*. The vehicle for resolution was available and actually invoked, notwithstanding the same, said petitioner voluntarily withdrew such charge precluding any such determination.

[7] As shown, *supra*, respondents also distributed literature publicizing the dispute, in other communities, cities and areas and arranged for other media communications of the issues.

such right, nor do they seek to support the foreign crewmen in any disagreement they have or may have with the petitioners. Additionally, none of the alien crew are members of respondents' unions and the latters protest picketing has been peaceful, limited in numbers to four pickets and without violence or threat thereof (petitioner's Appendix B, pages B1, 2). The pickets carrying the aforesaid picket signs spoke to no one and handed out literature containing details of their protest. Longshoremen and others, American employees of American employers, refused to cross the picket lines and work upon petitioners' two vessels (petitioner's Appendix B, pages 2 and 3).

Petitioners contend, that because the protest picketing relates to the alleged substandard wages and working conditions of its foreign seamen crews, as contrasted to American seamen, while the vessels are here in United States ports, such picketing directly interferes with such vessels internal affairs, ergo, under applicable law, the NLRB possesses no jurisdiction and state courts are empowered to issue restraints. As found by the courts below, and further demonstrated hereafter, petitioners are in error.

Our starting point are this Court's holding in *Wildenhus' Case*, 120 U.S. 1, and *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 124, that when a foreign vessel enters territorial limits of our nation, our jurisdiction and laws attach. Notwithstanding the same, we may exert only limited jurisdiction or none at all, *Cunard supra.*

Petitioners contend that the Act as interpreted and applied by this Court utilizing the *Cunard* doctrine *supra*, does not apply, for as they maintain, *supra*, the respondents conduct directly affects the internal affairs of their ships and their foreign crews. Reliance is placed upon *Benz* and *McCulloch*, *supra*, and *Incres Steamship Co.* v. *International Maritime W.U.*, 372 U.S. 24. Analysis of such decisions and others, reveals petitioners' error.

Benz involved a foreign vessel whose alien crew members engaged in a dispute with their employer while the vessel was in a United States port, and such foreign crew struck and picketed the vessel. The foreign seamen then designated an American union as their collective bargaining representative which then picketed the foreign vessel in support of the foreign crew members. Resisting injunction application, the American union *inter alia*, maintained it was engaged in activities protected by the Act. This court concluded, "* * * that Congress did not fashion (the Act) to resolve labor disputes between nationals of other countries operating ships under foreign laws", (*ibid.* 143). *Benz* manifestly is a factual situation wholly dissimilar to the case at bar and patently inapposite. However, as referred to in our previous discussion of *Benz, supra*, relative to purposes of the Act, this Court went on to pointedly emphasize, that within "the boundaries of the Act" are the "workingmen of our country and its possessions" (*ibid.* 144). And we submit at bar, it is such American workingmen, the American seamen who are within the boundaries of the Act, who are exercising rights therein provided not in support of foreign seamen such as in *Benz*, but in their own behalf and not as employees of any foreign vessel.

In *McCulloch*, an American union petitioned the NLRB for certification as the collective bargaining representative of alien crewmen employed aboard a foreign vessel whose foreign crewmen were already covered by a collective agreement between the foreign vessel's owner and a Honduran union. Once again, the facts are wholly dissimilar to the case at bar. In *Incres* again a foreign vessel with a foreign crew, an American union picketed the foreign vessel as part of its campaign to organize and represent the foreign seamen. Again, facts wholly dissimilar to the case at bar.

This Court in its *McCulloch* decision, made applicable to the *Incres* case on the basic issue (*ibid.* 25), relied upon its *Benz* holding, that the Act was applicable to "only the workingmen of our country", (*id.* 18). In *Incres*, this Court specifically noted that the sole issue before it both in *Incres* and *McCulloch* was the Act's application to disputes between *foreign ships and their foreign crews*, concluding that the Act was inapplicable to such disputes. *Incres*, however, points out that notwithstanding the Act's inapplicability to some entities concerning disputes *directly* involving such entities employer-employee relationship, the Act by some of its other provisions, is applicable to, and its provisions properly utilized by such very entities as to certain conduct of American unions, and the latters members. Citing its decision in *Local Union No. 25 of International Brotherhood of Teamsters* v. *N.Y. N.H. & H.R. Co.*, 350 U.S. 155 (1956), this Court made clear, that the Act's sections 303(a) and (b) (damage actions for illegal secondary boycotts), were applicable to entities whose employer-employee relations were nevertheless outside of the Act's scope, a railroad employer there, and as in *Incres*, the foreign vessel owner. The *Incres* court emphasized the above dichotomy as to the Act's application, depending upon the conduct involved, concluding that as to damages sustained for illegal secondary boycott, the Act's federal created right to recover therefor, is applicable, but as to conduct where the Act's NLRB could or would determine the representative for the foreign seamen, mandating the foreign owner to bargain with such representative, with concomitant rights and remedies provided by the Act, such provisions of the Act were inapplicable. The *Incres* court, in implementing the foregoing dichotomy to the conduct before them, held the Act to be inapplicable to such conduct because the, "* * * activities are *directly* related to *Incres* employer-employee relationship, since the very purpose of those activities was the organization of alien seamen on Incres vessels", (*ibid.* 28, emphasis supplied).

Most significant at bar, there is no such conduct as in *Incres*, which is actively seeking representation of the foreign crew and it is such conduct which constitutes the *direct* relationship to employer-employee relations.

Parallel to the Act's aforesaid Section 303(a) and (b), is the 1959 amendment of the Act's Section 8(b)(4)(B) (petitioners' Appendix F, pages F6-8). As so amended, the NLRB has exclusive jurisdiction to determine whether at bar, the picketing induced or encouraged the American longshoremen employed by American stevedoring companies who are admittedly engaged in commerce, not to work upon the picketed vessels, so as to cause such stevedoring companies to cease doing business with the foreign flag vessels, the latter being said statutes, "any or any other person", identical with the application of the provisions of Section 303(a) and (b) aforesaid, and which federal right and remedy is available in the United States to anyone, foreign or citizen. And it is exclusively within the NLRB's province to determine whether the aforesaid conduct constitutes prohibited conduct of American workingmen here in the United State or lawful conduct under such Section's provisos or decisional law. Most noteworthy is the fact that at bar the NLRB's aforesaid jurisdiction was invoked by one of the petitioners. The exclusive province of the Board to the facts in this dispute was fully recognized—a dispute not as in *Benz, McCulloch* and *Incres*, seeking recognition for and representation of the foreign crews to which the Act's provisions are inapplicable, but on the contrary, American workers activities here in the United States, eschewing such representation status, but instead the above described protest picketing, with requests to the public not to patronize the vessels. As to such conduct and activities, the NLRB's preemptive authority is applicable in the administration of Section

8(b)(4)(B).[8] Apparently, petitioners belatedly recognized the significance of the foregoing, triggering their voluntary withdrawal of said unfair labor practice charge.

In *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365, as the Texas court below illustrated, this Court drew an important distinction between the facts there present and those in *Benz. Marine Cooks* is conduct identical with that at bar. As stated by the court below this Court;

> "viewed the union members interest there as being 'in preserving job opportunities for themselves in this country,' not in the 'internal economy' of the foreign vessel. They were picketing on their own behalf and not for the benefit of foreign employees", (petition Appendix B, pages B9-10).

As further stated by this court in *Marine Cooks;*

> "Though the employer here was foreign, the dispute was domestic" (*ibid.* 371, 372).

And such conclusion, its precise language we submit, is equally applicable at bar. Respondents' dispute is here. Their members substantial loss of employment opportunities is in the United States. They do not support or seek representation rights of or for the foreign crews, as in *Benz* and *Incres*, let alone utilization of the Act's provisions thereof as in *McCulloch*. Their activities, in sharp contrast to *Benz, Incres* and *McCulloch* are *not directly related* to the foreign flag vessels employer-employee relations. To the contrary, respondents protest picketing activities is the antithesis of seeking representation rights

[8] As previously set forth, further premepted is the exercise of Section 7 rights by the picketing American seamen, protesting their loss of job opportunities aboard American ships here in the United States, and seeking to preserve those remaining, a condition brought about by the substandard wages and benefits paid and provided aboard foreign vessels transporting American sea borne commerce, contrasted to wages and benefits paid and provided American seamen.

for the foreign seamen or support thereof. Respondents are requesting that the foreign vessels and their crews be economically ostracized—don't patronize—help American seamen maintain their job opportunities here in the United States.

Further, as stated by the court below, this Court's decision in *Ariadne, supra,* supports the conclusion that the respondents peaceful primary protest picketing, is protected or arguably protected activity under the Act's Section 7 and not activity outside the Act's scope. This Court, in *Ariadne,* expressed the purport of its *Benz, McCulloch* and *Incres* holdings, to wit, that "disputes between foreign ships and their foreign crews", are not within the Act's coverage (*ibid.* 198, 199). Such are the disputes which involve "internal affairs" and "internal order and discipline of the foreign flag vessels". At bar there is no such dispute. As held by the court below:

> "The picketing in the *Ariadne* case could not have been any less destructive to the cargo-carrying business of the ships than the protracted picketing and conflict in *Benz.* So, it seems that the terms "internal affairs" and "internal order and discipline" must refer to the relationship between crew and employer and not to the carrying-on of the business for which the vessel is employed (a matter between shipowner and shipper)." (petition Appendix B, page B11).

It is paramount to note, as distinguished from the facts in *Ariadne,* where the involved longshore work in dispute was performed in part by the foreign crew,* but notwithstanding the same, this court found the Act applicable, at bar, none of the respondent unions members are employed

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* With respect to such fact, this Court in *Ariadne, supra,* put to one side, the effect if any, if such work is carried out entirely by a ship's foreign crew, pursuant to foreign ship's articles (*ibid.,* 199 fn 4). Such possible analagous fact however, is not present at bar.

by the foreign vessel or seek such employment. As the court below pointed out:

> "The protest (respondents) is not directed to allegedly substandard wages paid by foreign shipowners to then-employed American seamen, but to allegedly substandard wages paid to foreign seamen, with a concurrent request to the public not to patronize the foreign ships. There is no direct interference with the relationship between employer and crewmen. Any direct interference is between the consignee and the shipowner, or the shipowner and stevedore company. The fact that appellees are seamen and not merely longshoremen cannot indicate greater involvement in the internal affairs of the ships because none are employed on those ships, (petition Appendix B, pages B12-13).

Nor do the consequences of respondents' lawful primary protest picketing, calling to the American public's attention the facts of the American seamen's loss of job opportunities here in the United States, and the substantial cause thereof, concurrently requesting their help not to patronize the picketed foreign flag vessels, convert such successful activity into conduct of direct interference with the foreign flag vessels employer-employee internal affairs; *NLRB* v. *Fruit and Vegetable Packers Local 760*, 377 U.S. 72; cf. *Local 761 International Union of Electrical Etc.* v. *NLRB*, 366 U.S. 667, 673. Nor does the fact that protest picketing activities occurred at the site of the vessel, constitute direct interference with the foreign flag vessels employer-employee internal affairs, *Schneider* v. *State*, 308 U.S. 147; *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308.

As found by the court below, the respondents' picketing did not, "intervene(s) in an alien crewmen's strike or strive(s) to organize (petitioners) crewmen"—activity outside of NLRB's jurisdiction, to the contrary, such picketing, "but voice(d) a complaint as to foreign wages and urge(d) the public not to patronize (the) foreign vessels

(picketed)", (*id.* B13)—activity which is within the Board's exclusive jurisdiction, actually or arguably protected under the Act's Section 7, or prohibited or lawful under Section 8(b)(4)(B).

C. Respondents' activities are identical with long established and judicially approved conduct of lawfully requesting the public not to patronize foreign goods and services, in order to preserve domestic employment

It is gainsaid that historic and fundamental to our society is the right of American workers to lawfully picket and protest in the United States, the sale and furnishing of foreign made goods and services in our nation and to request the public's forebearance of such goods and services so as to preserve, maintain and at times, increase employment opportunities for residents of our country. Such is fundamentally the situation at bar.

Petitioners, manifestly to avoid the normal application of such long accepted rule to the events at bar, including the application thereto, of relevant domestic laws, e.g., the Act, and its exclusivity provisions, proffers that the respondents aforementioned "do not patronize" activities, because they involve foreign flag vessels, *ipsi dixit,* renders inapplicable the Act's provisions, and as petitioners pleaded in the state court below, constitutes tortious conduct remedial by state court restraint and damage award.

Petitioners in their aforesaid endeavor, contend that by spot-lighting the most substantial disparity between the wages and benefits existing between their foreign flag crews and American seamen, and concurrently successfully requesting that American residents not patronize the vessel, respondents by such activities are interfering with the internal affairs of their vessels, ergo, under this Court's *Benz, McCulloch* and *Incres* holdings, the Act and its preemptive provisions set forth in our Paragraphs A and B above, are inapplicable. The mere reading of such contention readily illustrates its error.

Petitioners' initial error is their failure to equate the term "internal affairs", with the vessel's "employer-employee relationship". In the authorities aforesaid cited by petitioners, this Court made precise, that it was the Act's application directly to the foreign flag vessels "employer-employee relationship" which was found inappropriate, as witness in such cases the union's conduct and activities to organize the foreign flag employees, represent them as their bargaining representative, seek NLRB election process for such purposes or support such foreign crews controversy with their foreign vessel employer. It is such employer-employee relationship, which is the vessel's internal affairs, further witness *Incres* specific language, "directly related to Incres employer-employee relationship". No such activities, "directly related to petitioner's employer-employee relationship", its internal affairs, is present here.

The conduct at bar is identical with frequent lawful protest picketing conduct in the United States, requesting persons not to patronize foreign made articles so as to preserve employment opportunities here in the United States. Surely such conduct is not "directly related to the employer-employee relationship", of the foreign manufacturer's plant in the foreign nation, so as to vitiate the exercise of American workers rights in the United States, provided for in the Act's Section 7. And the fact that the foreign manufacturer's plant, here the foreign vessel, momentarily comes within our territory, certainly does not automatically remove or vitiate the exercise here in the United States of this federally created right of the American worker, and /or remove with it, the exclusivity component thereof, which precludes state courts from jurisdiction of the dispute. We most respectfully submit, merely to pose the issue renders the reply automatic, to wit, the Section 7 right with its preemptive component remains fully intact.

D. Present is no issue which warrants this Court's review

We respectfully submit that our aforesaid argument demonstrates the absence of issue for this Court's review. The decision and opinion below, comprehensibly sets forth the applicable law and further demonstrates no warrant for review. The court below, in dismissing petitioners' cause of action, found unnecessary to pass upon other defenses asserted by respondents.[10]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[10] One of such asserted defenses was that the activities sought to be enjoined were protected by the constitutional guarantees of free speech (petition, Appendix B, p. B4). Such defense is identical to that raised by the petitioner in *Ariadne, supra,* but which this Court noted, that by reason of the conclusion reached there, it made unnecessary consideration of such further contention (*ibid.* 202).